Supreme Court, U. S.
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IN THE

Supreme Court of the United States

March Term, 1979

No. 78-1627

LARRY P. CRAMER,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FOURTH DISTRICT.

Larry P. Cramer, Pro Se,
Fairview Farm,
Sidell, Illinois 61876,
Petitioner.

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AUTHORITIES CITED

Cases

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Yates v. United States, 354 U. S. 298 (1957).

Statutes

Ill. Rev. Stat., Ch. 38, §§ 8-1, 8-2.

Constitutional provisions

Constitution of the United States, Amendments VI and XIV

Other authorities

Devitt & Blackmar, Fed Jury Instr., 2d Ed., 1974.

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No.

LARRY P. CRAMER,
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THE STATE OF ILLINOIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FOURTH DISTRICT.

The petitioner larry P. Cramer respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Fourth District, entered October 12, 1978.

OPINION BELOW

The opinion of the Appellate Court, reported at 64 Ill.App.3d 688 and 381 N.E.2d 827. appears in the Appendix hereto.

JURISDICTION

The judgment of the Appellate Court was entered on October 12, 1978. A timely petition for leave to appeal was denied without opinion by the Supreme Court of Illinois on January 25, 1979, as appears in the Appendix hereto. Certiorari is sought on the basis of 28 U. S. C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the petitioner was denied trial by jury and due process of law by the intervention of the trial court at his own initiative in the jury's deliberations to re-present the State's evidence.

2. Whether the petitioner was denied due process of law by being convicted on a general verdict when some of the counts which could have been the basis for conviction were dismissed after trial.

3. Whether the petitioner was denied trial by jury and due process of law where the jury was never instructed nor informed as to what overt acts in conspiracy were alleged or required to be proved.

4. Whether the petitioner was denied due process of law by the State's intentional concealment of evidence favorable to the defense under the Brady rule.

5. Whether the petitioner was denied due process of law and his rights under the Sixth Amendment in being tried and convicted on an indictment which failed to state a crime.

If certiorari is granted, the petitioner will brief and present the following additional point:

6. Whether the petitioner was denied due process by the monumental magnitude of cumulative erroneous evidentiary rulings of the State trial court on state and federal issues.

STATUTORY PROVISIONS INVOLVED

Ill. Rev. Stat., Ch. 38, § 8-1:

> Solicitation
> (a) Elements of the offense.
> A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense.

Ill. Rev. Stat., Ch. 38, § 8-2:

> Conspiracy
> (a) Elements of the offense.
> A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

Constitution of the United States, Amendment VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation . . ..

Constitution of the United States, Amendment XIV

> . . . (N)or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner was indicted on six general counts of solicitation and four counts of conspiracy to murder his wife, with each count of conspiracy alleging separate overt acts. The indictment was returned December 13, 1974, in Champaign County, Illinois.

The solicitation counts alleged the statutory language and pleaded no facts. The sufficiency of the indictment and the violation of due process was first raised in the post-trial motion in the trial cout, and argued again before the Appellate Court, which ignored the issue. No Illinois court has decided whether pleading the statutory language may properly charge solicitation and comply with federal due process.

The jury was never instructed nor told what overt acts in conspiracy were charged or required proof. The jury was also given general verdict forms.

The petitioner objected throughout and submitted proper forms of charge. Again, before the Appellate Court, the petitioner argued this court's line of cases following the Stromberg doctrine.

The State's evidence consisted primarily of four tape recordings of conversations between the petitioner and a co-conspirator accomplice, together with the testimony of the accomplice with some corroboration from a one-night girlfriend of the accomplice. The defense consisted of the testimony of the alleged victim, the petitioner's wife, who supplied an alibi for the initial solicitation and for one overt act, and who testified as to the harmonious marital relationship.

After the jury had deliberated on the case 22 hours, the trial court on its own iniative recalled the jury to the courtroom and inquired if replaying the tape recordings would help the jury reach a verdict. After receiving an affirmative response from the jury, the tapes were replayed, all over vigorous defense contentions that the court was coercing a verdict. State and federal cases were cited regarding the constitutional infirmity of the procedure utilized.

The petitioner was convicted upon general verdicts of solicitation and conspiracy.

Before the Appellate Court, the petitioner argued the Stromberg doctrine of this court to

the effect that a general verdict based upon a multi-count indictment cannot stand constitutionally when one of the counts which could have been the basis for conviction is invalid.

At a hearing on the post-trial motion, the trial court dismissed two counts of conspiracy because they involved overt acts after the accomplice had become a police operative.

After the post-trial motion was heard, but prior to sentencing, certain evidence favorable to the petitioner under the Brady rule came to the attention of counsel for the petitioner who filed a motion under Brady v. Maryland. This evidence is recited in the Reasons section following. The trial court heard evidence for three days then declined jurisdiction. The due process violation of the Brady rule and line of cases was argued in the trial court and in the Appellate Court, although the Appellate Court Opinion evaded the issue entirely.

The petitioner was sentenced to concurrent terms of from one to three years on each charge.

REASONS FOR GRANTING THE WRIT

I. Whether the petitioner was denied trial by jury and due process of law by the intervention of the trial court at his own initiative in the jury's deliberations to re-present the State's evidence.

The replaying of the tape recordings - the sine qua non of the State's case - catapaulted a speedy verdict 45 minutes later.

Where a trial court has made unwarranted inquiries of the jury, implied that the jury had to decide the case, implied an opinion, summarized the issues without mentioning the defendant's defense, given the dynamite charge followed by a speedy verdict, or repeated the dynamite charge when not requested to do so by the jury, coercion has been found. United States v. Seawall, 550 F.2d 1159 (1977); United States v. Harris, 391 F.2d 348 (1968), cert. den. 393 U. S. 874; United States v. Williams, 447 F.2d 894 (1971); United States v. Contreras, 463 F.2d 773 (1972); United States v. Diamond, 430 F.2d 688 (1970).

Rehearing any portion of the trial may have been "help" to the jury. If the court had asked if it would help to have the testimony of the petitioner's wife read to them, the court would have been emphasizing the evidence most helpful to the petitioner and could have led the jury to believe that the court felt the petitioner was innocent. But the court singled out the piece of

evidence most helpful to the State.

Not only did the court's action suggest to the jury that the court favored a guilty verdict and that the court felt the jury should hurry up and decide, but the procedure unquestionably placed additional and undue emphasis on the tapes. Calling the jury from the jury room to the courtroom, excluding spectators, and requiring the defendant to sit over his objection in view of the jury while the tapes were blared over amplifiers must have had a dramatic effect.

This was just quasi-legal jury tampering which has consistently been condemned in cases and situations far less odious than here.

Some years ago the courts of this country uniformly refused to permit any communication to the jury once deliberations commenced. Gradually, courts have over time permitted more and more judicial discretion to aid the jury in the form of reading transcripts of testimony, giving the Allen instruction, etc.

Not only was the unilateral intrusion of the trial court here into the jury's deliberative process a violation of federal due process which should be corrected by this court, and not only was the trial and Appellate Court rulings a departure from the standards set forth in the federal cases cited above - either of which reasons should be sufficient for this court to grant

certiorari, if not summary reversal - but also the development of the area of the extent and the manner to which a trial court can go in dealing with a jury's deliberations should be addressed by this court in the exercise of its supervisory authority to guide the lower courts. Trials should never be conducted in this manner by any court.

The outrageous conduct of the trial judge here in so brazenly implying how the jury should decide makes this a perfect case for this court to address the question of standards to be used in court-jury relations during deliberations.

2. Whether the petitioner was denied due process of law by being convicted on a general verdict when some of the counts which could have been the basis for conviction were dismissed after trial.

The petitioner sought to have the trial court give "guilty" and "not guilty" verdict forms as to each conspiracy count, since each count specified different overt acts at different times and places. Instead, a single general verdict form as to "guilty" or "not guilty" of conspiracy was given.

Two of the four conspiracy counts were dismissed after trial for failure to state crimes, since there could have been no conspiracy after one of two co-conspirators began work as a police

agent - a point the petitioner had argued to no avail during trial.

The basis of the jury's verdict was thus concealed from the court, as in the landmark case of this court in Stromberg v. California, 283 U. S. 359 (1931), where a general verdict conviction under a three-part statute was reversed where one part was later held unconstitutional, and it was impossible to tell whether the verdict was based on the valid part of the charge or the invalid part.

Yates v. United States, 354 U. S. 298 (1957), said at 312:

> In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected.

Yates was convicted on a general verdict where one of the multiple charges was later held to be barred by the statute of limitations.

The court cannot presume a conviction to be based upon a surviving ground, Williams v. North Carolina, 317 U. S. 287 (1942). If it "could have been" based on the invalid charge, the conviction does not pass constitutional muster, Street v. New York, 394 U. S. 576 (1969). Accord: Cramer v. United States, 325 U. S. 1

(1945); Terminiello v. City of Chicago, 337 U. S. 1 (1949); United States v. Driscoll, 449 F.2d 894 (1971).

The ruling of the Illinois courts is categorically contrary to the rulings of this court, and a flagrant case of judicial usurpation, which makes the granting of certiorari desirable if not compelled.

3. Whether the petitioner was denied trial by jury and due process of law where the jury was never instructed nor informed as to what overt acts in conspiracy were alleged or required to be proved.

Closely entertwined with the trial court's use of general verdict forms was the trial court's refusal of petitioner's request to define the issues in conspiracy to include the overt acts which were alleged and had to be proved, since the overtact is a part of the crime under the Illinois statute. Chapter 38, section 8-2 of the Illinois Revised Statutes states:

> A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

The jury was not told in the instructions what overt acts were charged. The jury was not told in argument what overt acts were charged. The jury was never read the charges. They were left with nothing but speculation as to what overt acts were in issue.

This fundamental error was further compounded by references in testimony to various acts of the petitioner and the co-conspirator which were never charged but which could have been construed as overt acts.

Under the court's instructions the jury would have been compelled to have rendered a guilty verdict if they, for example, believed the petitioner's purchase of insurance policies was an overt act, even though that was no part of the indictment.

Probably, no federal case has ever been tried under a conspiracy statute which required an overt act without the jury having been informed what overt acts were charged. (See, 1 Devitt & Blackmar, Fed.Jury Instr., 2d Ed., pp. 431-33, 444-45.) But conspiracy prosecutions are infrequent in Illinois.

While the Appellate Court avoided the petitioner's argument on the general verdict proposition of the Stromberg doctrine, that court seems to concede that the issues instruction was erroneous. Yet, two of the three panel

members found the error harmless because of proof of guilt, ignoring the petitioner's lengthy argument that there was reasonable doubt as a matter of law. This begs the question. Guilt of what? Acts proved but never charged? Acts charged but later dismissed. The circular reasoning in this anomalous situation has the majority of the Appellate Court substituting its own judgment for that of the jury to find guilt!

Thus, the majority of the panel presumes that the jury would have found guilt of the overt acts if they had only been apprised as to what they were. Such an aberration from established reviewing court principles cannot be countenanced.

The petitioner is entitled to a jury trial. It is not the function of any court of review to guess the jury would have found guilt of certain facts, when the jury itself has not done so.

4. Whether the petitioner was denied due process of law by the State's intentional concealment of evidence favorable to the defense under the Brady rule.

Prior to sentencing, the petitioner filed a motion for a new trial based on prosecution violations of Brady v. Maryland, 373 U. S. 83 (1963), which had just come to the attention of

defense counsel. The trial court conducted an evidentiary hearing, then later ruled that it had no jurisdiction, a position that had not been advance by the State, and which the petitioner had not been called upon to address.

This motion was directed to the State's second most important witness, one Patty Cozad, who was used to corroborate the accomplice's testimony as to various ventures, including his picking up a gun, buying a knife, and making several trips to a Chicago hotel one weekend for meetings with the petitioner concerning plans to kill the petitioner's wife while she and the petitioner were guests in the hotel.

Cozad's testimony was important, because it was presented to corroborate the testimony of an unreliable accomplice witness with pending felony charges, prior convictions, judicial admissions of perjury, etc - a witness who desperately needed corroboration. Instead of the jury being informed that Cozad was nearly as unsavory a character as the accomplice witness, her testimony was foisted upon the jury as that of a clean-cut ordinary citizen with no motive to fabricate, when the State knew better.

Testimony at the evidentiary hearing and matters of record disclosed the following undisputed facts:

a. The State filed its initial Answer to Discovery on December 30, 1974, listing as one of the State's witnesses a Patty Cozad, address unknown, and stating that the State had no information in its possession favorable to the defense under the Brady rule.

b. An Illinois Bureau of Investigation agent interviewed Patty Cozad on January 2 and on January 3, 1975, and she had four conferences with the Assistant Attorneys General prior to trial, which commenced March 31, 1975.

c. The petitioner filed a Motion for Compliance with the court's discovery order on January 31, 1975, alleging that the State was concealing Patty Cozad, and the court directed the State to furnish an address.

d. At no time prior to trial did the State furnish an address, despite repeated requests of defense counsel to the prosecutors.

e. The State knew that Patty Cozad was an extensive user of narcotics, had been for several years, and used them during the time period of her testimony.

f. Patty Cozad at the time she testified had pending in the same circuit court a charge of possession of a controlled substance, under the name of Patlyn Stafford.

g. "Patty Cozad" was an alias; her correct name was "Patlyn Stafford."

h. Cozad had a recent prior conviction involving a crime of dishonesty.

i. No memorialization was made by the State of any of their four interviews with Cozad.

j. Cozad sold controlled substances on March 7, 1975, to an Illinois Bureau of Investigation agent, in a controlled sale under the surveillance of the same agent who interviewed her on January 3, 1975, and who transported her to various meetings with the prosecutors - the agent in charge of investigating this case. However, Cozad was not arrested or formally charged with this offense until August 25, 1975, after the post-trial motion in this case had been denied.

k. Cozad was a some time room-mate of, and associate drug-user with one Mary Johnson - a person mentioned by name many times during the trial as a person the State implied the petitioner was having an extra-marital affair with, although no witness so testified.

l. At no time did the State furnish any information to the defense about Cozad other than her name alone, which was an alias.

The State's position was, at the Brady evidentiary hearing, that Cozad just by chance met the accomplice witness the day before he took her to Chicago overnight to witness his comings and goings; that Cozad did not know the petitioner; that Mary Johnson knew the

petitioner and Cozad, but not the accomplice witness. Thus, the State fell back on the theory that it was merely an amazing Ripley's Believe It or Not coincidence that out of the several hundred thousand women in East Central Illinois, the petitioner just happened to choose to have an affair with one who turned out to be a roommate of a person who, unbeknownst to the petitioner met and was with the petitioner's accomplicejust long enough to become his chief corroboration witness, although they never met or had contact before or after.

The petitioner was deprived of the opportunity to investigate the likely conspiratorial relationship between the accomplice witness, Cozad, and Johnson vis a vis the petitioner, and the obvious potential for coercion and manipulation of Cozad by the Illinois Bureau of Investigation agent.

Armed with this knowledge, the defense could have taken an entirely new thrust, expecially as to the connections among the triumvirate of Cozad, Johnson, and the accomplice witness.

Cozad's background and activities set forth above was also usable at trial under Illinois law, and the State even advised her that her drug use might be gone into during cross-examination.

Under different circumstances, but akin in principle to this case, the holdings of this court in Smith v. Illinois, 390 U. S. 129 (1968), and Alford v. United States, 282 U. S. 218 (1930), stand for the proposition that refusal of the trial court to permit the defendant to cross-examine as to the true name or place of residence of a prosecution witness is error. Alford reversed a conviction without a showing that the cross-examination, if pursued, would have brought out facts discrediting the witness. In Smith, the trial court permitted defense counsel to ask the principal witness for the State if "James Jordan" - the name under which he had testified - was his real name. He testified negatively. But the court refused to allow inquiry as to his real name or his address. On this basis alone the conviction was reversed.

Concealment of Cozad's address and her real name was tantamount to concealment of her identity. Hence, the State's conduct here goes even beyond the Brady area and into the heart of the rights guaranteed an accused by the Sixth Amendment.

Under the standards of United States v. Agurs, 96 S. Ct. 2392 (1976), this case could be analyzed in two different ways, either one making certiorari appropriate.

While there was no specific request for Cozad's narcotics use and dealings, nor for her pending cases or cases under investigation, there was a specific request before the court once and several times directly to the prosecutors for her address. Concealing her address and real name, which was specifically requested and ordered, thus served to conceal her criminal background from discovery by investigation.

As to the one conspiracy count where Cozad fig red prominently, this additional information could have created a reasonable doubt - assuming arguendo that the jury even convicted on this count - since the co-conspirator's testimony was sharply disputed by the alleged victim, the petitioner's wife, who provided an alibi for the petitioner.

Moreover, to the extent that Cozad's testimony bolstered the testimony of the co-conspirator as to anything, it bolstered it as to everything.

Analyzed as either a category two Agurs case - where the concealed information "might have" affected the verdict - or a category three Agurs case - where the concealed information must create a reasonable doubt, due process was denied, and the petitioner should be granted a new trial.

This was a close case as viewed from the

evidence and the length of jury deliberations, and the scales tipped to the prosecution only with the intervention of the court. This should be borne in mind in assessing the effect of the concealed information.

Without resorting to Agurs principles, this court should uphold the Smith and Alford propositions, if they are indeed good law.

It was well stated in United States v. Butler, 567 F.2d 885 (1978):

> When the government permits a witness to parade himself in false colors, and the truth is discovered, the motion for a new trial should be granted if the false testimony (or nondisclosure) could, in any reasonable likelihood, have affected the judgment of the jury.

5. Whether the petitioner was denied due process of law and his rights under the Sixth Amendment in being tried and convicted on an indictment which failed to state a crime.

The petitioner was tried and convicted on six general counts of solicitation which alleged that between February and December 13, 1974, the petitioner either encouraged or requested one Charles O. Weathington to murder Judy Cramer - the statutory language, with no facts alleged.

The Illinois solicitation statute, chapter 38, section 8-1, provides that "A person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense."

Two points are made here: (1) solicitation, like perjury, is a crime of words, and the words or the substance of them must be alleged in the indictment to comply with the Sixth and Fourteenth Amendments; and (2) the statute is so vague that facts must be alleged beyond the statutory language in order to state a crime.

When a crime is committed by words the indictment must set them forth verbatim or in substance. The Illinois Supreme Court so held in a perjury case. People v. Aud, 52 Ill.2d 368 (1972) The same result obtained in a case of unlawful representation to practice law. People v. Peters, 10 Ill.2d 577 (1957)

A vague statute like this solicitation statute must be, in any case, pleaded with facts rather than statutory language. (The Illinois Supreme Court has so ruled, not only in the Aud and Peters case, supra, but in a reckless driving case, People v. Green, 368 Ill. 242 (1938); and in a contributing to the dependency of a child case, People v. Chiafreddo, 381 Ill. 214 (1942). The statutes involved there were no less vague than the solicitation statute here.

This court has itself held in Russell v. United States, 369 U. S. 749 (1962), a case involving 2 U. S. C. § 192 - refusal to answer questions of a congressional committee -

that pleading the language of the statute was insufficient to state a crime - that the indictment must show the times and places of the hearings and the precise questions the defendant refused to answer.

It is a violation of due process to be convicted upon a defective indictment. United States v. Robinson, 495 F.2d 30 (1974).

The Appellate Court again evaded this issue entirely. Not only has the petitioner been deprived of due process in the rulings of the trial court on this and the other preceding issues, but he has been denied appellate review on many of these points. If a defendant complies with procedural requirements, he should have his allegations of state and federal statutory, constitutional, and case law irregularities and violations of due process at least ruled upon by a reviewing court, especially when some of these matters are clearly in the petitioner's favor. However, at no stage has the Illinois judicial system shown even the slightest interest in rectifying the fundamental injustice done to the petitioner and to the law.

The granting of certiori would cure that.

Numerous and critical errors of every conceivable nature pervaded these proceedings at every stage. No modicum of fairness required by due process has been extended to the petitioner.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Court of Illinois for the Fourth District.

Respectfully submitted,

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THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, *v.* LARRY P. CRAMER, Defendant-Appellant.

Fourth District No. 14061

Judgment affirmed.

Opinion filed October 12, 1978.

Mr. JUSTICE TRAPP delivered the opinion of the court:

Defendant appeals his convictions of conspiracy to commit murder (three counts), and solicitation to commit murder (six counts), entered upon jury verdicts.

Defendant's post-trial motion alleged some 70 errors, most of which are argued in defendant's brief. Upon *pro se* oral argument it is contended that the cause should be reversed for accumulated error and the argument was directed to the several errors discussed severally hereafter.

The sum of the allegations of the indictment is that between February 1974 and December 13, 1974, defendant conspired with a client, Weathington, to murder defendant's wife and that within such period defendant agreed and requested and encouraged Weathington to commit murder. (Ill. Rev. Stat. 1973, ch. 38, pars. 8—1 and 8—2.) On November 18, 1974, Weathington advised both the police and the State's Attorney of the schemes which are the subject of the prosecution and cooperated with them in the recording of certain conversations between the conspirators. He testified in behalf of the prosecution, both before the grand jury and at trial. Defendant's wife testified in behalf of the defendant. Defendant did not testify.

The trial court instructed the jury upon the issues of conspiracy in the language of IPI Criminal No. 6.04. The operative words considered here are, "Third. That an act in furtherance of the agreement was performed by any party to the agreement."

Defendant objected to the giving of the instruction for the reason that it failed to set forth the specific acts alleged in the indictment, and that it failed to require that one or more of the overt acts so alleged be proven beyond a reasonable doubt. The testimony includes and concerns acts of defendant and Weathington, any one of which may be deemed overt acts in furtherance of the conspiracy but which are not actually charged or alleged in the indictment.

The defendant also tendered an instruction which modified IPI Criminal No. 6.04, by stating in such third paragraph the overt acts which the indictment alleged were performed by defendant. The indictment did not allege any overt acts performed alone by the co-conspirator, Weathington. Defendant's tendered instruction was refused.

Section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—2) defines the elements of conspiracy. That definition concludes with the sentence:

"No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is *alleged* and proved to have been committed by him or by a co-conspirator." (Emphasis supplied.)

During the period when the co-conspirator, Weathington, was cooperating with the police, certain telephone conversations of the alleged conspirators were recorded. The recordings were played before the jury during the course of the trial.

Shortly after retiring the jury requested a transcript of the several recordings. The trial judge concluded that such transcripts were not offered into evidence and could not be sent to the jury. The jury then requested that the tapes and a machine to play them be provided. The request was denied because of the judge's concern that the tape recordings might be damaged or erased.

After the jury had deliberated some 20 hours, the trial judge and counsel conferred on the record. At that time the judge stated that he would ask whether or not the jury was making progress, saying:

"I propose to take the jury into the courtroom and inquire if they are making progress and if he says no, the foreman, and I propose to inquire of the foreman if playing the tapes would be helpful in arriving at a verdict. If he says yes, I then propose to ask each of the jurors as well. If each member of the jury says yes, I'm going to play the tapes for them *in camera* in the courtroom with only the defendant, his attorney, attorney for the people and the court being present."

Defendant's counsel objected to the playing of the tapes at such time after the prior jury request had been refused, asserting such to be an abuse of discretion and argued that playing the recording at that time would be a prejudicial emphasis upon the testimony. He also asked that certain defense cross-examination and evidence be reread to the jury. The court advised that he would not allow such defense testimony to be reviewed unless the jury asked for it.

The jury was returned to the courtroom and, upon inquiry, the foreman advised that he was of the opinion that the jury *was* progressing in its deliberations. The judge then asked:

"Would it help, in your opinion, in this case if you were to hear the tapes played here in the courtroom?"

The foreman responded affirmatively as did each juror upon individual inquiry. The recordings were again played and the 'defendant's objections, together with a motion for a mistrial, were denied. The jury returned a verdict within 45 minutes. The issue is preserved in the post-trial motion.

The prosecution argues that there was a proper exercise of discretion in suggesting the replay of the recording because the previous denial may have discouraged renewal of the request although the jury may have continued to be uncertain or confused.

Certain other issues preserved in the post-trial motion and briefed and argued on appeal are noted.

Defendant argues that the issues instruction, IPI Criminal No. 6.04, was erroneous in that, while it required the prosecution to prove that the conspirators agreed to commit the crime, it did not require the State to prove that they intended to agree. The words "intended to agree" appear to be directed to the notion that they agreed to conspire. Thus, defendant alleges that the trial court erred in denying his tendered instruction, IPI Criminal No. 6.03, modified to read, "intends to, and does agree with another." He cites P. Marcus, *Criminal Conspiracy: The State of Mind Crime*, 1976 U. Ill. L. F. 627.

We find that the study is directed toward the law required in Federal convictions. 18 U.S.L.A. §371 (1966) provides, "If two or more persons conspire • • • to commit any offense • • •." We note that the former Illinois statute (Ill. Rev. Stat. 1961, ch. 38, par. 139) defined conspiracy in the language "[i]f any two or more persons conspire or agree together • • •"

The present statute defining conspiracy uses different language. Section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par 8—2) provides, "A person commits conspiracy when, with intent that an offense be committed, *he* agrees with another • • •." (Emphasis supplied.)

Under the prior Illinois statute it was held that at least two parties with a common criminal intent are necessary to conspiracy, and where there are but two parties an acquittal of one required the discharge of the other. (*People v. Cohn* (1934), 358 Ill. 326, 193 N.E. 150.) It was held that more than one person must be guilty to sustain a conviction. *People v. Nathanson* (1945), 389 Ill. 311, 59 N.E.2d 677.

The present statute, however, specifically provides that these holdings are no longer effective. The present statute states in section 8—2(b) that:

"It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

(1) Has not been prosecuted or convicted, or

• • •

(4) Has been acquitted, • • •." (Ill. Rev. Stat. 1973, ch. 38, par. 8—2.)

Citing the present Illinois statute defining conspiracy, Marcus notes:

"Traditionally, courts analyzed the state of mind of *both* conspirators (the conspiracy requirement referred to two or more conspirators) to determine if more than one defendant intended to agree. If only one of the two conspirators meant to agree, and the other 'conspirator' only feigned agreement or had actually contacted the police, the state of mind necessary for a conspiracy would not exist; at least two parties must intend to enter into the conspiratorial relationship. More recently, however, the trend has

been away from requiring proof of an agreement by more than one defendant. The focus now is on the state of mind of the defendant on trial. This so-called 'unilateral approach' allows for the conviction of the defendant even if his 'co-conspirator' never intended at any time to enter into an agreement with the defendant. Typically, the unilateral approach statutes require that a court only focus on the intent of the accused to enter an agreement. The mental state of the defendant's co-conspirator is largely irrelevant." 1976 Illinois Law Forum 627, 628.

•1 By reason of our present statute we conclude that the intent to agree which defendant argues is encompassed within the language which requires allegations and proof that defendant agreed with another to commit an offense.

•2 Defendant argues that since the prosecution introduced evidence of motive, the trial court erred in denying his tendered instruction modifying IPI Criminal No. 3.04 to include "The State is required to prove a motive for the commission of the crime charged." The prosecution did not tender IPI Criminal No. 3.04. In *People v. Enright* (1912), 256 Ill. 221, 234, 99 N.E. 936, 941, the court said that if the accused committed the act, the question whether he had a motive or what it was is immaterial. While evidence tending to show the existence or nonexistence of the motive is admissible and the People may so show, they are under no obligation to do so. The opinion continues to state:

> "If the People claim that a motive existed inducing the commission of the act it must be proved, and, like any other circumstance, cannot be inferred, but as they are not required to show any motive a jury *should not be* informed that failure to show it tends to prove that the crime was not committed. * * *." (Emphasis supplied.) (256 Ill. 221, 234, 99 N.E. 936, 941.)

In *People v. Manzella* (1974), 56 Ill. 2d 187, 306 N.E.2d 16, the court stated that IPI Criminal No. 3.04 is to be used where the State had not attempted to prove motive. We conclude that defendant's argument misstates the rule of *Enright* and *Manzella*.

Defendant urges that the court commi ed reversible error in admitting into evidence what is termed evidence of other crimes. We summarize rather than detail the substance of the matter.

Weathington testified to the circumstances initiating the solicitation and conspiracy. Defendant had represented him as a client which apparently entirely consisted of criminal matters. The witness called at defendant's office in February 1974 to request a loan of $20. Defendant asked whether there was security and Weathington stated that he had some marijuana. Defendant inquired whether it was of good quality and smoked some in a pipe. There was no objection. The testimony is that during the course of the transaction defendant inquired whether the witness would like to make some money and the latter expressed interest. Without then naming the victim defendant proposed that Weathington assist in getting rid of someone. In a series of subsequent conversations,

Weathington was told the identity of the victim and various sums to be paid to Weathington were discussed. There followed suggestions and discussions regarding a series of schemes and methods for causing the death of the victim. The last proposal was that Weathington find a "hit man."

Weathington further testified that during later conversations he spoke to defendant regarding the then scheme of carrying out the conspiracy. At that time defendant stated that it was necessary to delay their preparations for the reason that there was some difficulty arising from his extramarital affair with the wife of a client. Defendant made objection and argued that the testimony was inadmissible, asserting prejudice. The prosecution suggested that the evidence was admissible to show motive and defendant's motions for mistrial were denied.

The prosecution failed to produce any further testimony concerning the extramarital problem which tended to establish motive. At the close of the prosecution's case, the court orally instructed the jury that "any evidence received in regards to the use of marijuana or immoral conduct was presented for the limited purpose of showing the relationship between the defendant and Mr. Weathington."

The written instructions included the language of IPI Criminal No. 1.01(6) regarding evidence admitted for a limited purpose. Defendant argues that the instruction was so delayed that the prejudice was not cured.

We agree with the trial court's conclusion that the testimony was relevant to the issues. In *People v. Manzella* (1974), 56 Ill. 2d 187, 196, 306 N.E.2d 16, 20, defendant argued prejudicial error in the admission of evidence of other assaults upon the victim. The evidence was held to be admissible, the court saying:

> "It is true, nevertheless, that evidence relevant to the main issue, and which serves to place the defendant in proximity to the time and place of the offense and which aids or establishes identity, and tends to prove design, motive, or knowledge, is admissible as an exception to the general exclusionary rule barring such evidence."

In *People v. Durso* (1968), 40 Ill. 2d 242, 239 N.E.2d 842, defendant, who was charged with murder, urged error in admitting evidence of narcotics transactions. The court stated the test for admission of evidence of other crimes was whether the evidence was so closely connected with the main issue that it tends to prove guilt of the crime charged.

The opinion in *People v. Tranowski* (1960), 20 Ill. 2d 11, 16, 169 N.E.2d 347, 349, states that other "crimes" which are wholly independent of and disconnected from the crime charged are not admissible, but continued:

> "But a corollary of the rule is that evidence, relevant to the main

issue, which serves to place a defendant in proximity to the time and place, aids or establishes identity, and tends to prove design, motive or knowledge, is admissible. [Citation.] Resolution of the conflict between the rule and the corollary depends on whether the evidence of other crimes is so closely connected with the main issue that it tends to prove the accused guilty of the crime for which he is being tried."

•3 The evidence at issue here was clearly intertwined with the negotiation and the progress of the conspiracy. It did not concern wholly independent and unrelated conduct clearly apart from the offenses charged. The transaction concerning a loan "secured" by marijuana was the point from which defendant opened discussion or suggestion of the acts constituting the objective of the conspiracy. That transaction was of a nature that might suggest to defendant that Weathington would be receptive to the proposals and did, as the trial judge concluded, explain the relationship between the parties.

The testimony concerning the extramarital affair originated in statements by defendant to Weathington explaining the cause for delay in the further discussion of the plans for carrying out the conspiracy. It was presented to the jury in the context of the course of the developing conspiracy, rather than introduced as wholly extraneous to the relation between the parties.

At the time that defendant objected to the testimony, the prosecution suggested the showing of evidence of motive. At that time the trial judge had no way of ascertaining the fact. At the close of the case in chief when all evidence regarding motive was disclosed to him he did instruct the jury of the limited purpose in the consideration of the jury.

•4 The argument that the rulings were too long delayed is not persuasive. Logically, it seems that orally instructing at the close of all prosecution evidence would more effectively impress than rulings scattered throughout the several days of testimony. We find no reversible error upon these issues.

Defendant argues that the trial court erred when it denied a motion to suppress certain electronic recordings, called "tapes," for the reason that it was not done in compliance with the then statute (Ill. Rev. Stat. 1973, ch. 38, par. 14—2(a)). That statute prohibited the use of eavesdropping devices unless such was done with the consent of one party and at the request of the State's Attorney. On four separate days telephone calls from Weathington to defendant were made from an investigating office. The recording device was attached to the telephone in that office and had no connection to defendant's telephone or its connecting lines. An assistant State's Attorney was present on each occasion.

The State's Attorney testified that he made a request for monitoring of

each call and that he had designated a named assistant to be in charge of such portion of the investigation. Each act of monitoring followed the request for that recording by the assistant State's Attorney and he was present. A fifth occasion involved the arrangement whereby Weathington wore a device which transmitted the conversation by radio and which was recorded.

The record shows no indiscriminate broad authority given to police officers to monitor defendant's conversations at their own discretion as in *People v. Porcelli* (1974), 25 Ill. App. 3d 145, 323 N.E.2d 1. In *People v. Richardson* (1975), 60 Ill. 2d 189, 328 N.E.2d 260, the Supreme Court determined that the State's Attorney had a large discretion in administering his duties in the authorization of eavesdropping activities. In *People v. Marlow* (1976), 39 Ill. App. 3d 177, 350 N.E.2d 215, the State's Attorney's request included the delegation of authority to a named assistant to authorize that it was done. The recorded evidence was held admissible. Here, as there, the assistant State's Attorney designated and specified the date and occasion for each recording. (See also *People v. Holliman* (1974), 22 Ill. App. 3d 95, 316 N.E.2d 812.) Defendant's argument that the State's Attorney gave "permission" rather than made a request is without merit.

•5 The several recordings occurred throughout a period of some three weeks. Defendant argues that that was an unreasonable period of time to authorize such recordings. We find the record supports the conclusion that each recording was made upon separate and distinct authorization.

•6 We have examined defendant's argument that there was not sufficient foundation to show the quality and accuracy of the recordings to permit their admission into evidence. We find no merit upon this point.

Defendant's argument that it was error to play the tapes in their entirety during the course of the trial is directed to the fact that they included conduct and references to conversations between Weathington and defendant which we have heretofore held admissible.

Defendant argues that the trial court erred in permitting the State's Attorney to play six portions of the tapes during the course of his argument. This record simply shows argument by the State's Attorney with a transcript notation that a portion of a tape was played. Neither the text heard nor the duration of the recording can be ascertained. Defendant likens the playing of the recording to the reading from a trial transcript during the course of an argument. Such has been considered to be error for the reason that there was an overemphasis of selected testimony. In *People v. Birger* (1928), 329 Ill. 352, 160 N.E. 564, however, it was held permissible for a State's Attorney to make a paraphrased recapitulation of testimony where his recollection had been refreshed

from notes or a transcript. In *People v. Morse* (1975), 33 Ill. App. 3d 384, 342 N.E.2d 307, *cert. denied* (1976), 426 U.S. 953, 49 L. Ed. 2d 1191, 96 S. Ct. 3179, it was held that a brief reference to the transcript was not reversible error. In *People v. Davies* (1977), 50 Ill. App. 3d 506, 365 N.E.2d 628, the court concluded that it was within the discretion of the trial court to permit the reading of a trial transcript during closing argument. That opinion noted the recent decision in *People v. Pierce* (1974), 56 Ill. 2d 361, 308 N.E.2d 577, which determined that it was within the discretion of the trial court to permit a jury to have a review of testimony after it retired to deliberate. That opinion states that the use of paraphrased recollection by an attorney penalized accuracy without necessarily reducing the emphasis of such testimony, and under the rationale of *Pierce* found no abuse of discretion in permitting the reading of a transcript which was "not so extensive as to unduly emphasize the testimony at issue • • •." (*Davies*, 50 Ill. App. 3d 506, 514, 365 N.E.2d 628, 634.) From this record it cannot be ascertained whether the recording played was so extensive as to produce a substantial prejudice.

The two principal issues have been stated but not yet reviewed.

•7 The trial court instructed the jury upon the issue of conspiracy in the language of IPI Criminal No. 6.04. The members of the panel agree that such instruction was error, in the light of the language of section 8—2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1973, ch. 38, par. 8—2), providing:

> "No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator."

A majority of the panel concluded, however, that the evidence of defendant's guilt is so overwhelming that the error may be treated as harmless. Judge Trapp is of the opinion that the error is such a deviation from the law and precedent that reversal is required. He so concludes upon the authority of *People v. Dorsey* (1936), 363 Ill. 403, 2 N.E.2d 321; *People v. Galvan* (1976), 42 Ill. App. 3d 390, 356 N.E.2d 139, and *People v. Dickerson* (1976), 41 Ill. App. 3d 464, 353 N.E.2d 427.

In *Dorsey*, defendant was charged with conspiring to purchase for others the conspirator's securities at exorbitant and extortionate prices. The trial court refused defendant's tendered instructions designed to limit the jury's considerations to the allegations of a bill of particulars restricting the charge to allegations that certain securities were fraudulent and worthless. The trial court submitted the issues upon allegations regarding the extortionate charges. In reversing and remanding, the reviewing court held that the issues must be limited to the allegations stated in the bill of particulars, stating:

> "None of the given instructions refer in any way to the bill of particulars or to the charge set forth in it. Obviously, the defendants were entitled to have the jury instructed on the issue as to which the prosecution was limited and upon which they were tried, and not upon some other and different issue." 363 Ill. 403, 408, 2 N.E.2d 321, 323.

In *Galvan*, defendants were charged with rape and conspiracy to commit aggravated kidnapping. The reviewing court found plain error arising in the fact that the issues instruction upon the charge of conspiracy was framed in terms of a conspiracy to commit rape and contained no mention of the elements of a conspiracy to commit aggravated kidnapping. In reversing and remanding, the reviewing court said that the jury must be instructed upon the offense charged.

In *Dickerson*, defendant was charged with receiving stolen property. The court determined that an element of that offense was defendant's knowledge of the fact that the property was stolen when he received it. The sum of the instructions, however, would permit the jury to convict defendant upon a separate offense of possession of stolen property. The latter was an offense for which defendant was not charged. The court said:

> "It is elementary, however, that a defendant may be convicted of only the offense with which he is charged, not of another offense with which he might have been charged." (41 Ill. App. 3d 464, 467, 353 N.E.2d 427, 428.)

It was determined that the error required reversal. In the light of the requirements of the statute, we conclude that there was reversible error in giving the issues instruction tendered by the defendant.

•8 The majority of the panel also conclude that any error arising from the trial court's offer to replay, and to the subsequent replaying, of the "tapes" of defendant's telephone conversations with Weathington was harmless beyond a reasonable doubt by reason of the fact that the evidence of guilt was overwhelming. Judge Trapp concludes that upon this record, the trial court abused its discretion for the reason that the jury might readily infer and conclude that the trial court considered such evidence critically important.

No cases have been found which report instances where a trial judge has proffered to review the selected testimony after the jury has retired. The opinion in *People v. Pierce* (1974), 56 Ill. 2d 361, 308 N.E.2d 577, established the rule that it is within the discretion of the judge to determine whether a jury's request to review testimony heard during trial be allowed. A dissenting opinion would adopt the view of the ABA Standards, Trial by Jury §5.2 (1968), that the trial judge must grant the

jury's request where the evidence directly relates to an issue before the jury. The question here, however, is not whether the court abused its discretion in refusing the jury's request to play the recording, but rather whether there was an abuse of discretion in volunteering and directing the jury's attention to specific prosecution evidence, and inquiring whether it would aid in reaching the jury's verdict.

The latter view is founded upon consideration of the authority of *People v. Baltimore* (1972), 7 Ill. App. 3d 633, 288 N.E.2d 659, and *People v. Golub* (1929), 333 Ill. 554, 165 N.E. 196.

In *Baltimore*, the jury reported that it was unable to reach a verdict in a murder trial after 15 hours of deliberation. The judge inquired whether the jury could reach a verdict without regard to the death penalty. The reviewing court concluded that as a matter of plain error the inquiry might be construed by the jury to indicate an opinion of guilt and for such reason reversed and remanded.

In *Golub*, the jury had been deliberating for 4 hours. The foreman reported that they had not reached a verdict. The trial judge remarked that the jury should have no difficulty in reaching a verdict upon the evidence presented. The opinion states:

> "The juror, as well as the judge, has an independent duty to perform, and he ought to be left free to pronounce his own conviction. A verdict hastened by the action of the judge, however worthy the motive, cannot be the result of that deliberation which the law guarantees. Remarks by a trial judge calculated to effect the rendition of a verdict without affording the jury an opportunity for careful consideration are unwarranted and often lead to great abuse. Whether the error is harmless or prejudicial depends upon the facts of the case." 333 Ill. 554, 561, 165 N.E. 196, 199.

In the context of whether the error was prejudicial or harmless, the opinion noted that the trial judge's remarks did not either expressly, or by implication, indicate that the jury should reach a particular conclusion. The record did not disclose how long the jury deliberated after they had retired a second time.

Here, the testimony concerned events occurring over a period of 11 months. The report of the foreman that the jury was progressing to a verdict negates any suggestion that the jury was then unable to reach a verdict, or was confused or uncertain concerning the evidence. The record discloses that the jury had continued to deliberate some 20 hours after the refusal of the initial request to hear the recording. This suggests that the jury members were not prevented from reaching a verdict because they could not recall or were uncertain about the testimony heard. This record does show that a verdict was returned within 45

minutes following the replaying of the "tapes." As distinguished from the facts in *Golub*, it is reasonable to conclude that the playing of the "tapes" upon the suggestion of the trial judge had a prejudicial consequence.

For the reasons stated herein, the judgment of the trial court is affirmed.

Affirmed.

CRAVEN and REARDON, JJ., concur.

Judgment of the trial court

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS)
)
vs.) Criminal Nos. 74-X-1967 and 75-X-159
)
LARRY P. CRAMER,)
Defendant.)

And now come the People of the State of Illinois by Assistant Attorney Generals Locher, Burnham and Resch, and said Defendant, Larry P. Cramer, is present in open Court with his Attorney, Donald M. Tennant.

At 2:50 P.M. the jury returns into open Court with the following verdicts:

"We, the jury, find the defendant Larry P. Cramer, Guilty of Solicitation to Commit Murder."

"We, the jury, find the defendant Larry P. Cramer, Guilty of o Commit Murder."

Jury polled at request of Defendant's Attorney.

Judgment entered on the findings of the jury.

April 16, 1975. HOWARD LEE WHITE, Judge.

Judgment of the Supreme Court of Illinois

Leave to appeal denied, 74 Ill.2d xx (1979), on January 25, 1979. No written decision. No written order.

Supreme Court, U. S.
FILED
JUL 25 1979
MICHAEL RODAK, JR., CLERK

No. 78-1627

IN THE

SUPREME COURT OF THE UNITED STATES

MARCH TERM, 1979

LARRY P. CRAMER,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

BRIEF FOR RESPONDENT IN OPPOSITION

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On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The preceding opinion of the Illinois Appellate Court has been previously submitted to this Court as an Appendix to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, as treated more fully in the argument contained herein, respondent does not believe that the petitioner has shown any reason for this Court to exercise its sound discretion to grant his Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Whether a trial court's action in allowing the jury to hear admitted evidence after the jury has begun deliberating violates the defendant's rights of due process and trial by jury.

2. Whether certiorari should be granted to review a conspiracy conviction when petitioner's own argument impliedly admits the validity of that conviction.

3. Whether the right to a jury trial and due process encompass the notion that conspiracy jury instructions must include the overt acts which were alleged in the indictment.

4. Whether any violation of *Brady* v. *Maryland,* 373 U.S. 85 (1963) took place, and if so, whether any of the alleged violations prejudiced the defendant.

5. Whether due process requires that solicitation indictments must specifically allege the exact words that were used to perform the alleged solicitation and whether the Illinois solicitation statute requires that the indictment be plead with more than the statutory language.

STATEMENT OF THE CASE

The People accept the defendant's statement of the case insofar as it gives a general overview of the trial proceedings. The People, in the course of the various sections of this Argument in this response, cite additional facts from the record that provide a fuller context for many of the legal issues posed by this appeal than is provided by the defendant's statement of facts. The People, therefore, direct the Court's attention to the Argument section of this Brief for their statement of the facts as to those issues on which the People feel that the defendant's statement is not complete. Where the People state no additional facts in a section of Argument, they accept defendant's statement as to the facts pertaining to that section.

REASONS FOR DENYING THE WRIT

I.

A TRIAL JUDGE HAS THE DISCRETION TO COMPLY WITH A JURY'S REQUEST TO VIEW EXHIBITS AFTER BEGINNING DELIBERATIONS, AND EVEN IF THE JUDGE EXCEEDED HIS DISCRETION THE ERROR WAS HARMLESS.

At the commencement of the jury's deliberations, the trial court judge decided not to send the electronic recording tapes along with other exhibits into the jury room. It is clear from the record that this decision was based on the court's fear that the jurors would not be able to operate the recording machine (R. 2151); the prosecutor himself had difficulty operating the machine during closing argument and had to rely on someone with technical skill, witness Mannix. (R. 2151) Of course, the court at this time could have exercised its discretion and allowed the jury to take the tapes and recorder into the jury room with any other duly admitted exhibits.

After the jury had been deliberating for less than two hours, it sent out a note requesting a transcript of the tapes and an Illinois road map. The court sent to the jury a note stating that "as a matter of law the court could not comply with this request because a copy of the transcript and a map of the State of Illinois have not been exhibits in the case and, therefore, are not evidence" (R. 2154). Shortly after receiving this response, the jury sent out another note asking for the tapes themselves and a recorder to play them on (R. 2154). After hearing argument from opposing counsel, the court sent back a note saying that the court had determined that the tapes and a tape machine cannot be taken to the jury (R. 2156).

At this point, the jurors may well have concluded that the tapes were *not* evidence in the case—a conclusion that would have been most prejudicial to the People. *See, United States* v. *Sellers*, 483 F.2d 37, 45 n. 13 (5th Cir. 1973), *cert. denied* 417 U.S. 908. This conclusion would have been a reasonable one for laymen to draw because the judge had said, first, that the transcript and map could not go into the jury room because they were not evidence and that, second, the tapes themselves could not go in. Reasonable jurors at that juncture might well have decided that the tapes were not evidence because the judge would not let them hear them.

Having received this erroneous impression from the court, the jurors, not surprisingly, made no further requests for the tapes. The next day, the court called the jurors into open court and inquired if the playing of the tapes would be helpful to the deliberations. Each juror said that this would be helpful. By playing the tapes at this point, the trial judge was doing nothing more than honoring their request for the tapes—something that he had the inherent authority to do. *Bustamente* v. *Cardwell*, 497 F.2d 556 (9th Cir. 1974); *People* v. *Pierce*, 56 Ill. 2d 361, 308 N.E.2d (1974). The *Pierce* Court held that the question of whether a jury request to review certain testimony should be granted is "best entrusted to the trial court's sound discretion," 308 N.E.2d at 578. The *Pierce* view reflects the position taken by the majority of the jurisdictions that have considered the question, *Ibid.* It is significant that there is a substantial body of opinion that holds that a trial judge *must* honor a jury request for material that directly bears on the issues that the jurors must resolve, see *ABA Standards, Trial by Jury*, Sec. 5.2(b), and *Pierce, supra*, Schaefer, J., dissenting, 308 N.E.2d at 579.

The *Pierce* case involved a request by the jurors to review certain testimony given at trial. If it is within the inherent discretionary authority of a court to honor such a request, then *a fortiori* a judge may allow a jury to review *exhibits* that it has requested. Many cases have upheld the sending of exhibits to

the jury room, including exhibits far more shocking and "prejudicial" than the ones at issue in this case. *See People* v. *Ciucci*, 8 Ill. 2d 619, 625 (1956) (a rifle, cartridge cases, bullets and blood-stained bed clothing). The trial court in this case simply committed no abuse of discretion, and the judgment should be affirmed.

Furthermore, as the Illinois Appellate Court found, even if there was error in the trial judge's procedure, the error was harmless, not prejudicial, because there was overwhelming evidence proving defendant guilty beyond a reasonable doubt.

There was evidence put before the jury supporting the conclusion that defendant tried to have his wife killed both for insurance proceeds and because of marital discontent. There was evidence that defendant solicited the services of a convicted felon to carry out the design and that the two men discussed a variety of ploys that would cause the death of Mrs. Cramer without implicating defendant or Weathington. Among the plans discussed were: inducing a Doberman pinscher dog to kill Mrs. Cramer (A. 135, R. 608); staging a car accident in which she would be killed (R. 604-5, 614, 624-26); staging a room break-in at the Palmer House Hotel in which defendant would be "accidentally" out of the room and Mrs. Cramer would be stabbed to death (R. 638); staging a canoe accident at an Indiana resort hotel in which Mrs. Cramer would be upended; employing a professional "hit-man" to carry out the execution of defendant's wife; staging a burglary at the Cramer home in which Mrs. Cramer would be killed by two intruders and defendant, apprised in advance of the time of the "invasion," would kill the burglars.

Some, though not all, of these schemes were discussed by defendant and Weathington in tape-recorded conversations; the authenticity and accuracy of the tape recordings cannot be seriously questioned. Weathington related other conversations with defendant, in one of which defendant graphically described for Weathington how, in the event that his wife was not killed by the impact of a planned car wreck, she could be killed by having someone smash her head against the car window (R. 740-41).

Viewed in its totality, the instant record establishes defendant's guilt by far more than the minimally sufficient evidence required for conviction. This Court, therefore, should not entertain its discretionary and important power of certiorari to review a legitimate exercise of a trial court's judgment, particularly where the exercise of that judgment resulted in the assurance of fundamental fairness to both the People of Illinois and the petitioner herein.

II.

STROMBERG v. CALIFORNIA, 283 U.S. 359 (1931) IS TOTALLY INAPPOSITE TO THE PRESENT CASE

A.

Petitioner Admits That At Least One Count of Conspiracy To Commit Murder Is Valid, Therefore, He Requests This Court To Do A Futile Act.

Petitioner was charged by indictment with four counts of conspiracy to commit murder. Abstract at pp. 1-2. Each count alleged an agreement with one Weathington to commit the offense. Each count alleged a distinct overt act. Count I alleged that petitioner "did transport said Charles O. Weathington to several places in search of a location for the commission of that murder." Count II alleged that petitioner "did deliver a knife to Charles O. Weathington." Count III alleged that petitioner "did check out a certain geographic location as a possible location for the commission of that murder." Count X alleged that

petitioner "did direct Charles O. Weathington to check out two certain locations to see if either would be a good place to commit that murder." On August 21, 1975, the trial judge in a post conviction proceeding dismissed Counts III and X of the Indictment. Abstract at p. 87. Petitioner now claims that *Stromberg* v. *California*, 283 U.S. 359 (1931) invalidates petitioner's convictions because the jury "might" have found petitioner guilty of the two counts that were dismissed.[1]

Petitioner cites *Stromberg* v. *California*, 283 U.S. 359 (1931) for the proposition that "a general verdict conviction under a three-part statute was reversed where one part was later held unconstitutional, and it was impossible to tell whether the verdict was based on the valid part of the charge or the invalid part." Petition For Writ of Certiorari, p. 10. Simply stated petitioner's perception of the arithmetics of this instant situation is erroneous. This follows because it is a certainty that at least one of the three counts for which petitioner was convicted has to be valid. And this is in accord with petitioner's own reasoning. Assuming *arguendo* that the jury convicted petitioner on the two conspiracy counts that were later dismissed, he still stands convicted on one of the other two counts. This is a mathematical fact. All of the cases cited by petitioner deal with the situation where the surviving ground "might" have been the basis of conviction. Here the possible surviving ground *must* have been the basis of conviction.

An exercise of this court's certiorari power is not necessary when petitioner admits that at least one of the conspiracy count convictions is valid and when one considers that he received concurrent sentences to run on all counts.[2] *See U.S.* v. *Drebin*, 557 F. 2d 1316, 133 (9th Cir. 1977) *cert. denied*, 98 S. Ct. 2232.

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[1] In subsection B of this issue respondents argue that evidence on Counts I and II was sufficient in any event.

[2] Petitioner does not argue, at this point, the validity of the convictions for six counts of solicitation to commit murder, the sentences for those crimes to run concurrently with the conspiracy convictions.

B.

In The Alternative Counts I, II, III And X In Essence Stated One Continuing Conspiracy. A General Verdict Of Guilty Is A Finding That The Jury Found An Agreement To Commit Murder And That The Jury Found That An Overt Act Was Committed In Pursuit Of The Agreement.

Another way of looking at the general verdict of guilty in the instant case is to examine the indictment itself. Each count of the indictment alleged the same agreement, i.e. "that he (petitioner), with the intent that the offense of murder of Judy Cramer be committed, did agree with Charles O. Weathington to the commission of that offense, . . ." Abstract at 1-2, 4. A finding of guilty as to three of the counts clearly indicates that the jury found that the defendant had entered into an agreement with Charles O. Weathington with the intent to commit murder. As to the overt acts alleged in Counts I and II there was specific evidence proving the existence of those acts. Count I alleged as an overt act that Cramer "did transport said Charles O. Weathington to several places in search of a location for the commission of that murder." The testimony of Weathington established the commission of this act. Abstract at pp. 135-136. Count II alleged as an overt act that Cramer "did deliver a knife to Charles O. Weathington." Weathington testified that petitioner gave him two $50 bills to buy a knife. Abstract at pp. 138, 139.

Bearing the above in mind respondents quote this Court's admonition in *Schneble* v. *Florida*, 405 U.S. 427 (1972), that the judicious application of the harmless error rule,

> does not require that we indulge assumptions of irrational jury behavior when a perfectly rational explanation for the jury's verdict, completely consistent with the judge's instructions stares us in the face. *Schneble* v. *Florida*, 405 U.S. at 431-32 (1972).

The jury, having found the agreement with intent to commit murder, certainly had a perfectly rational reason to find the alleged overt acts.

For the above reasons, this Court should deny certiorari as to this illusory issue.

III.

A JURY INSTRUCTION FOR CONSPIRACY TO COMMIT MURDER NEED NOT DEFINE THE ISSUES IN THE CONSPIRACY NOR NEED IT INCLUDE THE SPECIFIC OVERT ACTS THAT HAD TO BE PROVED.

Petitioner alleges here that the State violates due process and trial by jury when the following jury instruction is submitted to a jury.

> To sustain the charge of conspiracy, the State must prove the following propositions:
>
> First: That the defendant agreed with another to the commission of the crime of murder; and
>
> Second: That the defendant did so with intent that the crime of murder be committed; and
>
> Third: That an act in furtherance of the agreement was performed by any party to the agreement.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.
>
> IPI Number 6.04
> Peoples Instruction No. 15
>
> Illinois Pattern Instruction No. 6.04,
> Common Law Record at 47.

More specifically petitioner claims that the jury must be told in the instructions exactly what overt acts have been charged in the indictment. Petitioner claims that the failure to do this results in a jury speculating as to what overt acts are in issue.

Of course, petitioner cites no case law supporting his novel approach to the Fifth and Sixth Amendments. Respondents are not surprised. In fact the Illinois Supreme Court has expressly upheld the use of Illinois Pattern Instruction 6.04 when used in conjunction with Illinois Pattern Instruction 6.03 (as was the case here. Common Law Record at 47.) *People* v. *Heard*, 48 Ill.2d 356, 270 N.E.2d 98 (1971) *See* also, *People* v. *Jayne*, 52 Ill. App. 3d 490, 368 N.E.2d 422, 432 (1977)

Petitioner claims that "probably no federal case has ever been tried under a conspiracy statute which required an overt act without the jury having been informed what overt acts were charged." Petition at p. 12. Respondent will not endeavor to rebut the accuracy of such a bold assertion. Rather respondent points out to this Court that the statement has no application to this case. The record clearly shows that the indictment specifically alleged the overt acts charged. Since petitioner is a former public defender he surely knows that an indictment is always read to or by a jury. For petitioner to argue that the jury did not know what "overt acts were charged" is patently false.

The case of *United States* v. *Jackson*, 482 F.2d 1167 (10th Cir. 1973), *cert. denied* 414 U.S. 1159 well illustrates the function of the trial judge when instructing a jury in a federal conspiracy case.

> .... The court carefully explained to the jury what constitutes a conspiracy. It was emphasized that not only must there be a willful conspiring together of two or more persons to commit an offense against the United States, but

the offense is complete only if it appears from the evidence that any one of the overt acts alleged in the indictment is committed for the purpose of effecting the crime. . . . The trial court's function is to instruct on the general principles of the law of the case. It is not obligated to outline all possible factual situations which would fail to show one's connection with a conspiracy. *Jones* v. *United States, supra; Butler* v. *United States.* 197 F.2d 561 (10th Cir. 1952). The trial court's instructions clearly set out the elements of a conspiracy, and we can find no error in the manner they were given.

United States v. *Jackson,* 482 F.2d 1167, 1174 (10th Cir. 1973), cert. denied 414 U.S. 1159.

This contention is devoid of even arguable merit.

IV.

THE PEOPLE DID NOT WITHHOLD EVIDENCE FAVORABLE TO DEFENDANT.

Defendant claims that the People violated the dictates of *Brady* v. *Maryland,* 373 U.S. 85 (1963), by failing to disclose, *inter alia,* the following facts concerning Patty Cozad, a State's witness:

1. She had used drugs periodically;

2. She had a prior misdemeanor conviction of criminal trespass to property;

3. A charge of possession of a controlled substance was pending against her at the time she testified;

4. She had delivered a controlled substance to an Illinois Bureau of Investigation agent approximately one month prior to the time she testified;

5. She was acquainted with a Mary Johnson;

6. Her current address. Petition for certiorari at p. 15-16.[3]

The alleged non-disclosures summarized in paragraphs 1 through 5 above present a *Brady*-type issue, and will be addressed jointly. The alleged failure to provide Ms. Cozad's current address (paragraph 6) does not present a true *Brady* issue and will be addressed separately.

In determining whether the People had a duty to disclose the information set forth in paragraphs 1 through 5, the threshold question of whether the defendant specifically requested the information must be answered. Simply, the defendant never specifically requested this information in his pre-trial motion for discovery or otherwise. As a result the People had no duty to disclose these facts unless such facts would create a reasonable doubt as to defendant's guilt that did not otherwise exist. *United States* v. *Agurs,* 96 S.Ct. 2392, 2401 (1976). The People submit and will demonstrate that the information not specifically requested by defendant could in no way be deemed sufficient to create a reasonable doubt.

Patty Cozad had used drugs intermittently during a four-year period immediately preceding the time she testified (R.2361-2362, 2370). She was not an addict and had not used any drugs on September 16 or 17, 1974, the days she testified she was with Charles Weathington in Chicago (R.2367, 2387). Since the fact that Ms. Cozad had used drugs was not exculpatory, it could only have been used at trial, if admissible at

[3] These allegations were first raised by defendant in his "Amendment to Post-Trial Motion" filed in the trial court on November 7, 1975. The jury verdict was returned in this cause on April 16, 1975. Defendant's original post-trial motion was filed on June 10, 1975 and denied on August 21, 1975. As a result the "Amendment to Post-Trial Motion" was properly denied since it was filed more than thirty days following the return of the verdict. Ill. Rev. Stat., 1975, Ch. 38, sec. 116-1. *People* v. *Colletti,* 48 Ill.2d 135, 268 N.E.2d 397, 399 (1971).

all, in an attempt to attack Ms. Cozad's credibility, i.e., her ability to observe, recollect, etc. However, the value of this information for impeachment purposes would be minimal at best since she was not an addict and had not used drugs during the period she testified to. In this context it is important to remember that the substance of Ms. Cozad's testimony was merely that she and Mr. Weathington were in Chicago on September 26 and 27, 1974 and that Mr. Weathington obtained a gun and knife while there (R.1216-1243). She never testified that Mr. Weathington met with the defendant. These same facts were brought out during trial by witnesses, Charles Weathington, Jacob Asher, a clerk from the Harrison Hotel and in records from the Harrison Hotel and Palmer House. The fact that Ms. Cozad's testimony was cumulative, not disputed by defendant, and did not go to the main issue of the case, together with the fact that any impeachment value of the drug use information was minimal establishes that there was no violation of *Brady*.

The fact that Ms. Cozad had a prior misdemeanor conviction for the crime of trespass to property was not discoverable or admissible at trial since it could not be used for impeachment purposes. *People* v. *Montgomery*, 47 Ill.2d 510, 268 N.E.2d 695 (1971); I.R.S., Ch. 110A, sec. 412(a)(vi).

A charge of possession of a controlled substance arising from a June, 1974 automobile accident was pending against Ms. Cozad at the time she testified. The charge was in the name of "Stafford", Ms. Cozad's married name, which she no longer used. Due to this fact neither Ms. Cozad, the Sheriff's office, or the prosecutors were aware of the pending charge until October, 1975, six months after the defendant's trial. (R. 2384-2385, 2425, 2437, 2229) Also, approximately one month prior to the time she testified, Ms. Cozad delivered a controlled substance to an Illinois Bureau of Investigation agent. Ms. Cozad was indicted for the crime of delivering a controlled

substance six months later in August, 1975. She first became aware of the delivery charge in October, 1975 when she was arrested. (R. 2385). Since Ms. Cozad was not aware of the pending possession charge, or of the fact that she delivered a controlled substance to a state law enforcement official at the time she testified such facts could not have entered into her decision to testify on behalf of the People. Indeed, no consideration was given to the fact that she testified in the instant case in disposing of her drug charges, (R. 2497); nor was the possibility ever discussed (R. 2386). Clearly, defendant was not denied any material useful for impeachment purposes. Even if he was, the impeachment could not have created a reasonable doubt as to defendant's guilt.

It is true that Patty Cozad was acquainted with Mary Johnson. Mary Johnson was named on the People's list of witnesses but never testified. Defendant never requested to be informed of the relationship, if any, between the persons the People called as witnesses or considered calling as witnesses. The People are under absolutely no duty to provide such information especially where, as here, there is no indication whatsoever how the information is relevant much less favorable to the accused.

Defendant suggests that the non-requested information discussed above should have been supplied to him because it "might have" affected the jury's decision and it would have helped him better prepare his case. He also suggests that failure to supply this information demonstrates bad faith on the part of the prosecutors. Setting aside the accuracy of such conclusions, these considerations are totally irrelevant to the question of a prosecutor's duty to disclose favorable information. *United States* v. *Agurs*, 96 S.Ct. 2392 (1976) at pp. 2397-2398, 2400, 2401 f.n.20.

Finally, defendant alleges that the People failed to provide the address of Patty Cozad and that such failure was a violation

of the *Brady* mandate. Assuming the truth of this claim it does not raise a *Brady* question. *Brady* involved production of favorable evidence at trial. *Brady* v. *Maryland,* 373 U.S. 85 (1963); *United States* v. *Cole,* 449 F.2d 194, 198 (8th Cir. 1971). Neither Ms. Cozad's address or testimony was favorable, and even if favorable were produced at trial (R.1216). In actuality, defendant is claiming that the failure to provide Ms. Cozad's address prior to trial violated Supreme Court Rule 412(a)(i) and constitutes grounds for reversal.

On December 30, 1974, the People filed a response to defendant's discovery motion listing Patty Cozad as a possible witness and listing her address as "unknown". At this time the prosecutors were not aware of Ms. Cozad's address (R.2213). Subsequently Ms. Cozad advised the prosecutors that she resided at 504 Elm Street, Urbana, Illinois (R.2233-2234). This information was conveyed orally to Mr. Tennant or his associate Mr. Frank, at some unspecified time prior to trial (R.2228). Mr. Tennant also gained this address independently by examining the court file on March 17, 1975 (R.2397). Ms. Cozad resided at the Elm Street address from the beginning of January to the beginning or middle of March, 1975 (R.2344). At that time she moved to 700 S. Goodwin Avenue, Apartment number 1, "above Trino's" (R.2344). She did not advise the prosecutors of her new residence (R.2372, 2381). The prosecutors, however, learned of the new address and advised Mr. Tennant of Mr. Frank at some unspecified time prior to trial (R.2228). Mr. Tennant's recollection was that he was not advised of the "Trino" address until after the trial commenced, approximately April 7, 1975 (R.2399). The People submit that based on the record, Mr. Tennant or his associate were advised of the whereabouts of Ms. Cozad prior to trial. However, even assuming that Mr. Tennant was not so informed, defendant was not prejudiced and no reversible error resulted.

At no time did defendant request that the People produce Ms. Cozad in order that he might interview her prior to trial

because he was having difficulty locating her. Defendant did request that the People produce Mr. Weathington for a pre-trial interview and the People complied (R. 2455-2456). At the time Ms. Cozad took the stand, defendant did not object on the basis that he had not been supplied with her address or had not had an opportunity to interview her or for any other reason. Defendant did not request to interview her when she took the witness stand. Defendant was certainly not surprised by her testimony since he had been supplied with a copy of her statement on January 29, 1975 (R. 2214; C 168-175) which was substantially the same as her testimony. Differences between the two were brought out by defendant on cross-examination. Defendant did not request to interview Ms. Cozad after her direct testimony. The failure to raise this matter when Ms. Cozad took the stand or to request sanctions under Supreme Court Rule 415(g) constituted a waiver of the issue. *People* v. *Emery,* 12 Ill.App.3d 332, 297 N.E.2d 604, 606-607 (5th Dist. 1973); *People* v. *Wright,* 14 Ill.App.3d 445, 302 N.E.2d 633 (1st 1973).

Further, assuming the People did fail to provide Ms. Cozad's current address, this omission did not prejudice defendant and therefore, does not require reversal. Failure to comply with Supreme Court Rules governing pre-trial discovery requires reversal only where the non-compliance prejudices the defendant to such an extent as to deny him due process of the law. See, *People* v. *Tate,* 63 Ill.2d 105, 345 N.E.2d 480, 484 (1976); *People* v. *Hunsaker,* 23 Ill. App. 3d 155, 312 N.E.2d 155, 739 (5th 1974); also see, *People* v. *Jordan,* 38 Ill.2d 83, 230 N.E.2d 161, 167 (1967). Defendant herein was not prejudiced. He knew what Ms. Cozad's testimony would be since he was provided with a copy of her eight page statement long before trial. If defendant wanted to interview Ms. Cozad he could have requested the People to produce her prior to trial as he did in the case of Mr. Weathington. Defendant could have requested a recess in which to interview her during trial.

Defendant did neither. The lack of prejudice is further demonstrated by defendant's failure to raise the issue at trial or in his post-trial motion. He first raised the issue in his "amendment to Post-Trial Motion" (R. 509) filed November 7, 1975. Therefore, any failure to comply with Supreme Court Rule 412 was harmless.

V.

ALL OF THE SOLICITATION COUNTS PROPERLY STATED THE OFFENSES ALLEGED

Defendant contends that Counts IV through IX, Common Law Record 2-4, of the indictment did not properly state the offenses alleged in those counts. Counts IV, V and VI state that, on different dates, the defendant "did request" Charles O. Weathington to murder Judy Cramer. Counts VII, VIII and IX state that, on those same respective dates, the defendant "did encourage" Weathington to commit the offense (A. 2-4). The relevant statutory language provides that "a person commits solicitation when, with intent that an offense be committed, he commands, encourages or requests another to commit that offense," Ill. Rev. Stat., ch. 38, Sec. 8-1.

Defendant maintains that the solicitation counts were fatally insufficient because they did not set forth the exact words used by the defendant in soliciting Weathington to kill Mrs. Cramer. Defendant relies on *People* v. *Aud*, 52 Ill. 2d 368 (1972), in which the Supreme Court held that a perjury indictment that did not include the words actually used in the perjured statements did not state the offense of perjury. In *Aud* the Court said that a perjury indictment must include the actual statements, either verbatim or in substance, because "the offense of perjury can be committed only by the use of words; the words used are both the offense and the means by which the offense is committed," 52 Ill. 2d, at 370.

The defendant claims here that solicitation is also a crime that can be committed only by the use of words and that, therefore, the *Aud* rule should apply to this case. No case supports defendant's claim that solicitation is to be treated like perjury for pleading purposes, and defendant cites no decision that even arguably stands for the proposition urged on this Court by defendant. The crime of solicitation, unlike that of perjury, can be committed by conduct as well as by words: one may encourage someone to do something by a course of action as well as by speech. All the solicitation counts, in conjunction with the bill of particulars provided by the state (C. 200 *et seq.*) served to give defendant more than adequate notice of the offenses alleged.

CONCLUSION

For the foregoing reasons, respondents pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

March Term, 1979

No. 78-1627

LARRY P. CRAMER,

Petitioner.

vs.

THE STATE OF ILLINOIS,

Respondent.

REPLY BRIEF TO STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Larry P. Cramer, Pro Se,
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Petitioner.

In The

SUPREME COURT OF THE UNITED STATES

No. 78-1627

LARRY P. CRAMER,

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v.

THE STATE OF ILLINOIS,

Respondent.

REPLY BRIEF TO STATE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR GRANTING THE WRIT

1. Whether the petitioner was denied trial by jury and due process of law by the intervention of the trial court at his own initiative in the jury's deliberations to re-present the State's evidence.

Tape recordings in this case were virtually an "instant replay" of the alleged crime, and far more critical than the re-reading of other testimonial evidence would have been. Yet, the State likens them to mere "exhibits" such as a gun or bed-stained clothing. Tape recordings are not in this category of exhibits once they are played, when they become testimonial in nature.

The State's contention that the jury may have concluded that the tapes were not evidence

contained only a surface logic which is speculative at best, immaterial to the point made here in any event, and certainly disspelled by the later conduct of the trial court.

The trial court has no authority to initiate the procedure for re-hearing evidence and singling out what that evidence should be. For all we know, the jury may have wanted to read only such of the transcripts as were necessary to clear up a dispute over a single fact. But the trial court belatedly foisted the entire tape situation upon the jury in an "all or nothing" choice.

Even though the Sppellate Court agreed that this procedure was error, and then by a two to one vote concluded without discussion that there was some overwhelming unspecified proof of guilt, the clear fact remains that the jury never concluded guilt before this exploitation of the tapes.

In effect, the trial court requested a guilty verdict, and the jury complied.

2. Whether the petitioner was denied due process of law by being convicted on a general verdict when some of the counts which could have been the basis for conviction were dismissed after trial.

The State's Response seems not to understand that the dismissed counts could have been the sole basis for conviction.

If the jury felt that only an overt act specified in one of the dismissed counts had been proved, they would still have been compelled under the court's instructions to return a guilty verdict.

If separate verdict forms had been used, and the petitioner acquitted of the surviving counts and convicted of the later-dismissed counts, the verdict obviously could not stand. Since this cannot be determined, this is the exact situation where the Stromberg line of cases applies.

Just because the State introduced some testimony to support each of the four overt acts alleged is no showing that the jury believed all of them to have been proved beyond a reasonable doubt.

Even if the State's new theory that this was just one continuing conspiracy is adopted, the finding of the commission of just any overt act is not all that is required to support a verdict.

Under Illinois law there can be no conspiracy nor an overt act after one of two conspirators becomes a police operative. This was the basis for dismissal of the two counts in this case. This is also logical; otherwise, an informer-conspirator could commit a series of overt acts at police direction which would be chargable to the co-conspirator. The record must show a finding of guilt as to an over act which has been charged (see the next section) and which has not been eventually dismissed.

3. Whether the petitioner was denied trial by jury and due process of law where the jury was never instructed nor informed as to what overt acts in conspiracy were alleged or required to be proved.

The State concedes that the instructions never informed the jury what overt acts were charged and required to be proved, but advances the new argument that the indictment which specified the overt acts was read to the jury. Then the State says, "For petitioner to argue that the jury did not know what 'overt acts were charged' is patently false."

Before the State accuses this petitioner of making a "patently false" argument before this court, they should find in the record a reference to the indictment having been read to the jury or by the jury. It is not in the record. It was

not done. It is not even the practice in Champaign County, Illinois, to read the indictment to the jury or let them read it.

The "patently false" characterization lies with the State's reckless disregard of the record, not with this petitioner's argument.

The cases cited by the State have no bearing whatsoever on this issue, and this point stands without contradiction in the record: the jury was never in any manner apprised of what four overt acts were charged here.

CONCLUSION

For the foregoing reasons, it is again prayed that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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